PUBLIC PROSECUTOR

v.

HO NEE FAT

HIGH COURT MALAYA, PENANG
TUAN JEFFREY TAN JC
[CRIMINAL CASE NO. 47-12-91]
16 JANUARY 1995.

***EVIDENCE**: Charge of trafficking in dangerous drugs - Prosecution alleging that accused gave information leading to discovery of drugs - Prosecution attempting to invoke provisions of s. 27 Evidence Act 1950 - Whether information given by accused led to discovery of drugs - Whether said information admissible - Application of s. 27 Evidence Act - Principles applicable.*

***DANGEROUS DRUGS**: Charge of trafficking in dangerous drugs - Drugs found hidden in various parts of car driven by accused - Whether presumption under s. 37(h) of the Dangerous Drugs Act could be invoked against the accused - Whether drugs were hidden in specially constructed compartments.*

***EVIDENCE**: Charge of trafficiking in dangerous drugs - Prima facie case - Evaluation of defence evidence - Burden of proof - Prosecution relying on presumption under s. 37(h) of Dangerous Drugs Act to prove its case - Whether presumption rebutted.*

The accused was charged with trafficking in 10,488.8 grammes of heroin, an offence under s. 39B(l)(a) of the Dangerous Drugs Act 1952 (DDA 1952). The drugs were discovered in various parts of a car being driven by the accused. Some of the drugs were allegedly discovered after the accused had "shown" the hiding places of the drugs. The prosecution attempted to admit the evidence leading to the discovery of the drugs under s. 27 of the Evidence Act 1950 (the Act). The prosecution further relied on the presumption under s. 37(h) of the DDA 1952 to show knowledge on the part of the accused.

The question that arose was whether the accused had succeeded in rebutting the presumptions raised against him.

Held:

[1] Section 27 of the Act is an exception to the general safeguards and prohibitions imposed by the preceding ss. 24, 25 and 26 against the admission of incriminating statements by an accused. Therefore, information evidence under s. 27 is admitted only on clear and unmistakable evidence that the accused gave the information which led to the discovery of a fact.

[2] According to SP5, the accused "menunjukkan" a place of concealment, and acting on that information he discovered the first opening. If indeed the accused "menunjukkan" the first opening, the *modus operandi* for concealment was then revealed most unmistakably and the exigency to further question the accused would then be passed. In the circumstances, SP5's evidence on the discovery of the other openings underscored his eagerness for the most damning evidence to be secured in the name of discovery, when discovery it could no longer be. This taint on SP5's evidence on the discovery of the second, third and fourth openings sullied his evidence on the discovery of the first opening and raised a real reservation as to the truthfulness and candour of his entire information evidence.

[3] In the absence of clear-cut evidence that the accused gave the information that led

directly to the discovery of the openings, there being a doubt as to its reliability and veracity, the information evidence "menunjukkan" could not be admitted in evidence.

[4] The 22 packets of heroin found hidden were concealed in specially constructed compartments in the car, and the accused as the person in charge of the car at the material time, was deemed under s. 37(h) DDA 1952 to have knowledge of such concealment. Therefore the accused's assumption of custody and control of the car, *ipso facto* amounted to his possession of the 22 packets. In the circumstances the prosecution had made out a *prima facie* case beyond all reasonable doubt which unless rebutted would warrant the accused's conviction.

[5] It is a cardinal principle that the onus of proving the guilt of an accused is throughout on the prosecution. That burden is also an extended burden to defend the *prima facie* case the moment the defence is called as the *prima facie* case is vulnerable to the defence. A belief or disbelief of a defence cannot spring from an impulse or fancy but must be supported by cogent, legitimate and justifiable reasons from the evidence. The reasons proffered after a careful consideration of all available evidence must also withstand contrary persuasion, or such belief or disbelief will not be tenable.

[6] In the circumstances of the present case, the defence has raised more than a reasonable doubt though not necessarily having rebutted unquestionably the legal presumption. In the circumstances of such a doubt whether or not the defence had rebutted the legal presumption, *in dubio sequendum quod tutius est* the safer course should be followed by giving the benefit of the doubt to the accused. There being such a doubt in the present case and the accused benefiting from it has succeeded in rebutting the presumption.

[Accused acquitted and discharged].

Cases referred to:
Leow Nhgee Lim v. R ***(refd)***
PP v. Lai Ah Bee [1974] 2 MLJ 74 ***(refd)***
Pang Chee Meng v. PP [1992] 2 SCR 1 ***(refd)***
Krishnan v. PP [1987] 1 MLJ 292 ***(refd)***
Wai Chan Leong v. PP [1989] 3 MLJ 356 ***(refd)***
Lam Chi Ming & Others v. R [1991] 3 AER 172 ***(refd)***
PP v. Khoo Boo Hock [1990] 1 CLJ 971 ***(refd)***
PP v. Basri bin Salihin [1993] 1 AMR 3 ***(refd)***
Syed Ali bin Syed Abdul Hamid & Anor. v. PP [1982] 1 MLJ 132 ***(refd)***
PP v. Lin Lian Chen [1992] 2 MLJ 561 ***(refd)***
Tong Peng Hong v. PP [1955] MLJ 232 ***(refd)***
PP v. Ang Soon Huat [1991] 1 MLJ 1 ***(dist)***
Khoo Hi Chiang v. PP [1994] 1 MLJ 265 ***(foll)***
PP v. Munusamy [1987] 1 MLJ 492 ***(foll)***
PP v. Leong Heo Cheong [1990] 2 CLJ 818 ***(refd)***
Yuvaraj v. PP [1969] 2 MLJ 217 ***(refd)***
Mohamaed Radhi bin Yaakob [1991] 3 MLJ 169 ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 27, 45
Dangerous Drugs Act 1952, ss. 37A, 37(h), 37(d), (da)

For the Public Prosecutor - Mariani binti Ghani, DPP
For the Accused - R. Rajasingam; M/s. R. Rajasingam & Co.

JUDGMENT

Jeffrey Tan JC:

The accused was tried on the following charge:

> Bahawa kamu pada 23 April 1990, pada jam lebih kurang 12.10 pagi, di Sekatan Jalanraya, di hadapan Balai Polis Nibong Tebal, di dalam Daerah Nibong Tebal, di dalam Negeri Pulau Pinang, telah mengedar dadah berbahaya, iaitu heroin seberat 10,488.8 gram dan oleh itu kamu telah melakukan kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum dibawah Seksyen 39B(2) Akta yang sama.

The prosecution called 12 witnesses, and their testimony *inter alia* brought forth the following evidence:

(a) at 12.10 a.m. on 23 April 1990 the accused was driving a Mercedes-Benz motor car bearing registration number BAM 8532 (the car) along the main road Butterworth to Nibong Tebal, when he was stopped at a police road block in front of the Balai Polis Nibong Tebal.

(b) a search of the car found no incriminating articles, but the removal of the carpet of the car uncovered 4 metal plates screwed onto the right and left running boards of the car with one metal plate positioned below each of the 4 doors. On removal of these 4 metal plates, 4 openings were found on the running boards (see Exhibits P12A to P12F).

(c) inside the 4 openings were found 32 plastic packets of a white substance.

(d) behind the console box and beneath the dashboard of the car were found 8 plastic packets of a white substance.

(e) the 40 packets of white substance (40 packets) were analysed and found to contain 10,488.8g of heroin, and heroin is listed in the 1st Schedule of the DDA 1952.

(f) the car was registered in the name of SP12, the secondary wife of the accused.

The prosecution presented the above evidence without much challenge. However, the defence disputed the homogeneity of the samples used in the chemical analysis and argued that the openings are not specially constructed compartments within the meaning of s. 37(h) of the DDA.

The accused's custody and control of the car *ipso facto* was not custody and control of the 40 packets in the car; there must be the essential proof of the accused's knowledge of the 40 packets, although it need not amount to a full and exact knowledge, and a general knowledge will suffice (see *Leow Nhgee Lim v. R*). Conversely, full and exact knowledge without any custody or control will also not suffice [see *PP v. Lai Ah Bee* [1974] 2 MLJ 74].

On the accused's knowledge, the prosecution applied to adduce the following evidence:

(a) the accused's answer "Pek Hoon" in reply to questions put to him by SP5; that evidence was not admissible under s. 27 of the Evidence Act 1950, as it was an answer indicating nature or character of drugs and not connected to its discovery, nor was it considered for admission under s. 37A of the DDA as the accused was not cautioned.

(b) the accused *menunjukkan* the hiding places of the packets - that evidence was not admitted under s. 27 for the reasons given below.

Section 27 of the Evidence Act 1950 is an exception to the general safeguards and prohibitions imposed by the preceding ss. 24, 25 and 26 against the admission of incriminating statements by an accused; the reason is plain, for incriminating statements usually oral, are easily manufactured, and yet if admitted would be devastating to an accused. Therefore, information evidence under s. 27, is admitted only on clear and unmistakable evidence that the accused gave the information which led to the discovery of a fact.

The Supreme Court in *Pang Chee Meng v. PP* [1992] 2 SCR 1, per Abdul Hamid LP at p. 5, expressed the following caution:

> Section 27 has frequently been misused by the police and the Courts should be vigilant about the circumvention of the provision... The Courts should be very vigilant to ensure the credibility of evidence by the police personnel in respect of this section which is so vulnerable to abuse."

Courts are therefore decidedly cautious in admitting confessional and incriminating statements, and s. 27 is strictly interpreted, such that:

(a) not one word more of the information supplied should be given in evidence than is strictly necessary to show that the fact which was discovered is connected with the accused (see *Krishnan v. PP* [1987] 1 MLJ 292 per Wan Sulaiman SCJ at p. 295).

(b) the information must be such as has caused the discovery of a fact; the fact must be the consequence and the information the cause of its discovery and relate distinctly to the fact discovered (see *Wai Chan Leong v. PP* [1989] 3 MLJ 356 per Gunn Chit Tuan SCJ (as he then was) at p. 358).

(c) emphasis is placed on the fact discovered and not on the information, for the fact discovered confirms the truth of the information (see *Pang Chee Meng v. PP* [1992] 2 SCR 1 per Abdul Hamid LP at p. 5).

(d) the information was properly and fairly obtained and not compelled from an accused (see *Lam Chi Ming & Others v. R* [1991] 3 AER 172).

(e) the exact questions put to an accused must be proved beyond all reasonable doubt, so that precisely what was intended to be conveyed by an accused could be ascertained (see *PP v. Khoo Boo Hock* [1990] 1 CLJ 971).

SP5, who searched the car and recovered the 40 packets introduced the pertinent evidence "that the accused *menunjukkan* the place of concealment" after his earlier searches had drawn a blank. However, the manner in which he gave that crucial evidence - he was summarising and not giving a detailed account - left much to be desired. His bare evidence of *menunjukkan* without more to (i) the preceding circumstances and events, (ii) exactly what had transpired during the search and recovery of the packets, (iii) the precise manner and the circumstances in which the information was given, was most unsatisfactory and failed to instill any confidence that s. 27 was not conveniently taken advantage of.

There was evidence that the arresting officers had targeted the car. Yet, when the car was before them at the police station - little imagination was needed then to reason or guess that any drugs to be found, will be found somewhere in the car - they questioned the accused incessantly for hiding places, exhibiting thereby a conduct closer to an extraction of information than fair exhortation.

There was reason beyond to doubt the veracity of that information evidence. According to SP5, the accused *menunjukkan* a place of concealment, and acting on that information he discovered the 1st opening. SP5 then asked further and the accused *menunjukkan* the 2nd opening, and from which opening SP5 found further packets. On yet further enquiry, the accused pointed out the 3rd opening and so forth until the discovery of the 4th opening and the packets within. If indeed the accused *menunjukkan* the 1st opening, it was then revealed most unmistakably to SP5, the *modus operandi* for concealment. The exigency to further question the accused would then be passed; yet SP5 seemingly lost and without direction, pelted the accused for disclosures.

SP5's evidence on the discovery (if not on the 1st) on the 2nd, 3rd and 4th openings, underscored his eagerness for the most damning evidence to be secured in the name of discovery, when discovery it could no longer be. This taint on SP5's evidence to the discovery of the 2nd, 3rd and 4th openings, sullied his evidence on the "discovery" of the 1st opening, and raised a real reservation to the truthfulness and candour of his entire information evidence,

The accused was handcuffed, and the manner in which he *menunjukkan* - by words, action or a combination of both - was highly relevant. Yet, astonishingly that was left unsaid, and the bare *menunjukkan* with few details, provided frail and feeble material upon which it could be conclusively said, that the information said to have been given, was beyond all reasonable doubt given and led directly to the discovery of the 4 openings.

Viewed with the entire evidence on the discovery (or recovery), the failure to caution the accused was not assuring. The importance of s. 37A(1)(b) DDA could not have been lost to the arresting officers; yet with ample time and opportunity, none cautioned the accused while subjecting him to lengthy questioning. It could only be reasonably deduced, that the caution was deliberately withheld to enhance the prospect of securing incriminating evidence, which could be frightened off if the accused was read his rights.

Although s. 27 of the Evidence Act and s. 37A of the DDA are distinct and separate (see *Wai Chan Leong v. PP* (*supra*)), the administration of an early caution, more so in capital offences, will instill confidence that information evidence was fairly and properly obtained and not by any abuse of authority or unfair measure.

It must be stressed that s. 27 evidence is to be adduced with particular care for a detailed and complete disclosure of (i) all surrounding circumstances, (ii) the conduct of the accused, (iii) the precise words of the questions and the response (iv) the exact words conveyed by the accused (v) the manner the information was delivered, and (vi) the demeanour of the examiner and other persons of authority present. In adducing that evidence there cannot be any approximation or summary, or the Court's reluctance to accept such evidence will not be surmounted, as Courts are notably unwilling to receive information evidence, not so much that it was fabricated, but that the prosecution had failed to give the assurance that it was not fabricated.

In the absence of clear-cut evidence that the accused gave the information that led directly to the discovery of the openings, for there was doubt to its reliability and veracity (see *PP v. Basri bin Salihin* [1993] 1 AMR 3), the information evidence *menunjukkan* was not admitted.

Although the information evidence was rejected, and there was no other evidence on the accused's knowledge, the prosecution had a surrogate in s. 37(h) of the DDA which reads:

> if any dangerous drug is found concealed in any compartment, specially constructed for the purpose, on any vehicle, it shall until the contrary is proved, be deemed to have been so concealed with the knowledge of the owner of the vehicle and of the person in charge of the vehicle for the time being.

For that presumption to arise, there must be the embryonic evidence of (i) the concealment of drugs and (ii) a compartment specially constructed on the car for the purpose of that concealment. Concealment in any other feature of a car will not attract this presumption.

On the 4 openings, SP10 testified that both the running boards of the car were cut open, and the openings he saw were not features of the original car chassis. He described the running boards as encased hollow channels on the left and right sides of the floor board of the car.

SP10 was not put forward as an expert witness under s. 45 of the Evidence Act; nonetheless, (i) his 20 years' service and experience at the workshop of the Cycle & Carriage (M) Sdn. Bhd., that services and repairs Mercedes-Benz cars, (ii) his position as a supervisor in that workshop, (iii) his possession of a diploma in automobile engineering and (iv) his familiarity with similar cars, equipped him with knowledge to speak with authority on the running boards. His evidence was received as factual evidence.

From the evidence adduced it was evident that the 40 packets were concealed; it only mattered if the concealment invited the presumption under s. 37(h) of the DDA:

(a) the 8 packets found behind the console box and below the dashboard were not concealed in a storage container receptacle or a part gained by an addition or modification. The console box, so SP10 testified, was in the original car and the space between the console and dashboard would be found on all similar cars. Undoubtedly, those 8 packets were concealed in the space available in the car, and s. 37(h) has no application.

(b) as for the balance 32 packets recovered from the 4 openings on the running boards, there was a break in the prosecution's evidence - SP5, who searched the car and recovered the 32 packets, failed to establish from what part of the car he recovered 10 of those 32 packets. He said he recovered 22 packets from the 1st, 2nd and 4th openings, but failed to state the number of packets recovered from the 3rd opening (that below the door of the driver). The doubt to the place of concealment of those 10 packets, was resolved by excluding s. 37(h) to those 10 packets.

Without the facts essential for the application of s. 37(h) and any direct evidence on the accused's knowledge, the prosecution had failed to prove the accused's possession of 18 packets; with those 18 packets subtracted, there remained just 22 packets for consideration under s. 37(h).

The running boards were encased hollow channels and its inner cavities for storage or concealment could only be gained by a modification, executed in the instant case by incising into it. The incisions created openings and covered by metal plates and carpeting, the running

boards were converted into secret storage compartments, where there were none before. Things deposited within would be hidden from view, and in those compartments the 22 packets were found.

The 22 packets were therefore found to have been concealed in specially constructed compartments in the car, and the accused as the person in charge of the car at the material time, was deemed under s. 37(h) until the contrary is proved, to have knowledge of such concealment. With that presumed knowledge, the accused when he assumed custody and control of the car, assumed not a normal car or reasonably expected of a normal car (without unexpected or special features found not in identical cars), but of a car with knowledge that it concealed drugs within its running boards. That *ipso facto* amounted to his possession of the 22 packets.

It was put forth that s. 37(d) has no application whatsoever, for the 22 packets were not contained in "anything whatsoever containing", and in its absence, custody or control cannot amount to possession.

Section 37(d) of the DDA 1952 reads:

> any person who is found to have had in custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug.

It is trite that a car is not a "thing containing" (see *Syed Ali bin Syed Abdul Hamid & Anor v. PP* [1982] 1 MLJ 132, and *PP v. Lin Lian Chen* [1992] 2 MLJ 561, both decisions following *Tong Peng Hong v. PP* [1955] MLJ 232), and the 22 packets not found in a container or other receptacle, would certainly not attract s. 37(d). However, possession need not be proved only through s. 37(d), as s. 37(da) is a distinct and separate provision and if the evidence points irresistibly to possession, the absence of the intermediate "anything whatsoever containing" will not inhibit a finding of possession without resort to s. 37(d).

On the issue that the samples used in the analysis were not representative samples of the drug exhibits, the defence cited the Singapore Court of Appeal case of *PP v. Ang Soon Huat* [1991] 1 MLJ 1 as authority that a doubt to the homogeneity of sample will cast a sufficient doubt to the prosecution's case.

In *PP v. Ang Soon Huat*, the homogeneity of samples used for analysis was disputed, and the Court of Appeal accepting the possibility of a higher degree of error inherent in the chemical analysis than was allowed for by the government chemist, found a doubt whether the accused had committed an offence of a higher or lower degree.

The factors *inter alia* that persuaded that finding of doubt were (i) the base substance was not pulverised before it was blended (as in the instant case) and (ii) the evidence of a consultant toxicologist (testifying for the accused) who explained how the nett weight of diamorphine could reasonably be less than 15g and not 18.77g as stated in the charge. The accused, given the benefit of the doubt, was convicted of possession instead of trafficking.

But that was a case bordering a lesser offence, and at p. 12 of the report, the Court did ask itself whether the prosecution had discharged the high degree of probability that the amount of diamorphine was not less than 15g. The weight of heroin involved in the present case is very much above 15g, and any conceivable error to SP1's (the chemist) conclusions, due to

his failure to pulverise the base substance before blending, or due if any to his less than perfect analytical method, could not possibly have affected his findings to such an extent, as would have raised a reasonable doubt that the heroin content is less than 15g.

Section 37(da) provides a minimum tariff of 15g to attract the presumption, and the prosecution would have discharged its burden if it has proven beyond all reasonable doubt that the heroin (or other drug carrying the same tariff) content in the drug exhibits weighs more than 15g (see *PP v. Ang Soon Huat* (*supra*) note: in that case, it was proof on a very high degree of probability).

In drug related offences, the weight of drug content is an important and commanding issue; but this importance is only whether the weight is more or less than the tariffs specified for lesser or higher offences. In offences attracting s. 37(da) (which provides for a minimum weight), the need to prove the weight of drugs to be exactly and precisely that weight stated in the charge is non-existent, if it is proven beyond all reasonable doubt that the weight of drug content in the drug exhibits is above 15g.

To prove the weight as stated in the charge, conclusively and beyond every conceivable scientific and experimental possibility, is to do the impossible. Calibrations and instruments, the chemicals used, the respective qualitative and quantitative tests, and the analytical process itself can all be disputed or be challenged by the latest scientific techniques and knowledge. The Act should not be paralysed by such an absurdity for its intent must be read *verba cum effectu accipienda sunt* and effect be given to it. The burden of proof beyond all reasonable doubt must be placed within reasonable bounds or otherwise for even straightforward cases, and as an illustration in car theft cases, the car would have to be scientifically and mechanically proven conclusively and beyond all reasonable doubt to be a car.

In borderline cases a marginal error in the quantitative computation may be crucial. However, in cases where the amount of drugs involved is substantial and far beyond the statutory minimum, any exercise casting suspicion and uncertainty to chemists' findings on the weight of drugs, must ultimately fail. Chemists are factual witnesses (see *Khoo Hi Chiang v. PP* [1994] 1 MLJ 265) and there no need for them to explain step by step the chemical analysis carried out (see *PP v. Munusamy* [1987] 1 MLJ 492), and their conclusions will be factually accepted, without scientific scrutiny or experimentation, unless it is inherently incredible or the defence calls evidence in rebuttal, or other equally compelling reasons see fit to do otherwise. In the present case, s. 37(da) was invoked not just because there was no doubt whatsoever that the heroin content in the drug exhibits is not less than 15g, but also because it weighs 10,488.8g.

That realised all ingredients of the accused's possession of the 22 packets which collective weight exceeding 15g brought invocation of s. 37(da).

Having evaluated the prosecution evidence on the bench mark set by the authority of *Khoo Hi Chiang v. PP* [1994] 1 MLJ 265 and satisfied that the prosecution had made out a *prima facie* case beyond all reasonable doubt which unless rebutted would warrant the accused's conviction, the accused was called upon to enter his defence on an amended charge; the weight of heroin was amended from 10,488.8g to 5,890.2g (the collective weight of heroin in the 22 packets).

The accused testified under oath that:

(a) his 1st wife and her brother from Kangar came to his house in Sungai Petani on 19 or 20 April 1990, and requested that he return to Kangar, to attend to urgent family business.

(b) he followed them to Kangar in their car and left the car (BAM 8532) in Sungai Petani under the care and custody of his 2nd wife (SP12).

(c) he returned to Sungai Petani on 22 April 1990 and was informed by SP12 that one "Tan Wei Loon" had taken the car on the 20 April 1990 but returned it on the 22 April 1990,

(d) he was further informed by DW2 that one Ah Loon had telephoned and requested that he contact Ah Loon.

(e) he contacted Ah Loon by telephone who requested him to drive the car to Kuala Lumpur.

(f) he left for Kuala Lumpur on 22 April 1990 and in that journey he was arrested.

The accused nevertheless agreed that he had sole custody and control of the car at the material time and packets of white substances were indeed recovered from the car. However, he exculpated himself from the 4 openings and the concealed packets.

DW2 testified that the accused's house had no telephone and the accused would use his telephone and give his telephone number to others. He confirmed the accused's evidence that Ah Loon telephoned on 22 April 1990 and as requested by Ah Loon, he had on the same day passed on Ah Loon's message to the accused.

SP12 under further cross-examination, testified that apart from the accused others too had use of the car. She said as part of her business she hired out the car and that she was solely in charge of this car rental business. She appended that one Ah Loon took the car on 19/20 of April 1990 and returned it on 22 April 1990, and further verified the accused's story that the accused was in Kangar at the request of his 1st wife.

At the close of the defence case, the prosecution submitted that the defence was not at all believable and urged its total rejection.

A belief or disbelief of a defence cannot spring from an impulse or fancy but must be supported by reasons, cogent legitimate and justifiable from the evidence. The reasons proffered after a careful consideration of all available evidence must also withstand contrary persuasion, or such belief or disbelief will not be tenable.

Indispensable in the above deductive process is (i) an observation of witnesses' demeanour in their rendering of their evidence, cogency and accuracy of recollection of pertinent facts, (ii) a comparison of their evidence with other available evidence, and (iii) an evaluation if their testimony after the test of cross-examination is intact, strengthened or discredited.

The proceedings were therefore scanned and the evidence felt out for that achieved by the prosecution to sustain its perceived disdain for the defence.

The accused pleaded innocence and said he had less than exclusive custody and control of the car as it was accessible to others, and this lack of exclusive custody or control accounted for the packets concealed in the car, a defence he built around the following pertinent evidence:

(a) Tan Wei Loon's use of the car for the 2 days immediately preceding his arrest.

(b) SP12's hiring out of the car to others.

(c) DW2's evidence on Ah Loon's telephone call and Ah Loon's instructions to the accused to drive the car to Kuala Lumpur.

(d) the accused's absence from Sungai Petani when the car was taken and returned by Tan Wei Loon.

Startlingly, the prosecution mainly countered that defence with a "*saya cadangkan*" or "I put it to you". Undoubtedly the prosecution dictated the manner and mode of its challenge, but it was essential to test and contest the defence (see *PP v. Leong Heo Cheong* [1990] 2 CLJ 818) if it is to be shown as one implausible and not to be believed.

A trenchant test on the defence was called for, and yet the prosecution failed altogether to examine the defence on (i) the accused's 1st wife and her brother (ii) the family problem in Kangar and (iii) the car rental business of SP12. That omission to examine and delve into the surrounding circumstances and events on the issues raised by the defence, could not be commended, as it missed the opportunity to scrutinise (i) the unity and integration of the defence, (ii) the consistency between the defence witnesses and (iii) the reliability of defence witnesses. Defence witnesses' credibility was not diminished, and their testimony being untested, emerged consistent and integrated, albeit in a curious and unexpected way.

Even some rudimentary and exploratory inquiry to yawning gaps in the defence such as (i) the applicable licences for the car rental business, (ii) the income tax returns of the car rental business, and (iii) the car rental business books accounts and other related business documents, which could shed more light to the car rental business, was foresaken.

For what it was worth, it was put to the defence witnesses that their testimony was mere fabrication; but nothing additional was done to firmly plant its improbability, and what chance there was during cross-examination to nail the defence and canvass its incredulity, slipped and frittered away.

Most lamentable of all, the lack of any real test effectively conceded the defence, provided inadequate grounds to forge the cogent and satisfactory reasons for any justifiable disbelief of the defence, for nothing telling was undertaken and achieved which shows the defence as false.

The introduction of mysterious persons such as "Ah Loon" in drug trafficking cases is now close to customary, and admittedly "Ah Loon" was not easy to follow. However 3 witnesses (the accused, SP12 and DW2) bear witness to such a person, and none were discredited. As such it would be unsafe to dismiss peremptorily "Ah Loon" as a figment of their imagination for *testibus non testimoniis credendum est*, credence is given to the witnesses and not their testimony. The weight to be attributed to evidence depends upon the character and credibility of witnesses, and since the witnesses who testified for the accused were not shown to be doubtful or incredible witnesses or of abandoned or profligate character, the weight given to their testimony could not be lessened.

Assuming that "Ah Loon" is to be discounted for the sake of argument, yet there remains the unrebutted and untarnished evidence of the car rental business to be assessed for its sufficiency to upset the *prima facie* case and to rebut the legal presumption.

It is a cardinal principle that the onus of proving the guilt of an accused is throughout on the prosecution and there is no burden upon an accused to prove anything. If upon the whole evidence the Court is left in a real state of doubt, the prosecution has failed to satisfy the onus of proof which was upon it. That doubt can arise from the prosecution's case or from the defence.

That burden upon the prosecution is by extension an extended burden to defend the *prima facie* case the very moment the defence is called. As the defence is unraveled, the prosecution must stay alert and be wise to its effect on the *prima facie* case. Nothing should be overlooked, for even disparate bits of the defence, much more so if unrebutted, could later rally into a doubt sufficient to bring down the *prima facie* case.

On the current bench mark of a maximum evaluation, there was no doubt of a *prima facie* case at the close of the prosecution's case. However, that hard earned *prima facie* case was of malleable form as it was vulnerable to the defence.

The accused has succeeded in establishing, not by a doubt, but by his unrebutted evidence of his nonexclusive use of the car. That presented a distinct and likely possibility which could not be ignored, that the secret compartments were constructed and drugs concealed by a third party with access to the car without the accused's knowledge, as the concealed compartments were neither visible nor detectable by a visual inspection even carried out painstakingly.

That possibility would offer the accused (if he truly had no knowledge) no other likely exonerating explanation, except a steadfast plea of innocence. To expect the accused to prove who constructed the compartments and concealed the drugs would surely place upon him a higher burden than is required by law, for if truly innocent he surely would not know from whom and what place to gather proof to vindicate himself in the first place.

The prosecution indignantly contended that even unrebutted, the defence has not discharged its burden to rebut the presumption under s. 37(h).

Admittedly in this case, a doubt would not be sufficient for with the invocation of s. 37(h) the accused was required to rebut the presumption on a balance of probabilities (see *Yuvaraj v. PP* [1969] 2 MLJ 217 and *Mohamad Radhi bin Yaakob v. PP* [1991] 3 MLJ 169), with proof that it was more probable (i) that he did not know of the concealment of the 22 packets and (ii) he was not trafficking in heroin.

In the instant case, the defence has raised more than a reasonable doubt, though not necessarily having rebutted unquestionably the legal presumption. In circumstances of such a doubt - whether the defence had rebutted a legal presumption - *in dubio sequendum quod tutius est* the safer course should be followed by giving the benefit of that doubt to the accused. There is such a doubt in the instant case, and the accused given the benefit of that doubt had succeeded in rebutting the presumption.

Responding dismally to the defence and dismissive of it while it was not inherently incredible, the prosecution was scantly able to defend and preserve the *prima facie* case.

The accused is therefore acquitted and discharged.